

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:HAR:TL-N-1289-01

CJSantaniello

date: MAR 12 2001

to: Robert Arrigo, Team Manager, Group 1121, Norwalk, CT
Attn: John J. Dellasala, Team Coordinator

from: Associate Area Counsel, LMSB, Area 1

subject: Large Case Advisory Opinion - [REDACTED]

THIS DOCUMENT INCLUDES CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE SERVICE, INCLUDING THE SUBJECT TAXPAYER. THIS DOCUMENT ALSO CONTAINS TAX RETURN INFORMATION SUBJECT TO THE PROVISIONS OF I.R.C. § 6103 AND ITS USE WITHIN THE SERVICE SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW IT.

We are responding to your memorandum dated February 1, 2001, in which you requested legal advice regarding the appropriate manner to extend the statute of limitations for the taxpayer's taxable years [REDACTED] and [REDACTED]. For the reasons set forth below, we believe that [REDACTED] ([REDACTED]), into which [REDACTED] ([REDACTED]) merged on [REDACTED], is the proper party to extend the limitations period for [REDACTED]'s pre-merger consolidated return years. We have also included language that should be included on the Form 872.

Issue

Who is the proper party to extend the statute of limitations on assessment for [REDACTED]'s taxable years [REDACTED] through [REDACTED]?
U.I.L Nos. 1502.99-00; 6501.04-05; 6501.08-00

Facts

For the taxable years [REDACTED] through [REDACTED], [REDACTED] (EIN [REDACTED]), filed consolidated returns as the common parent of a consolidated group. On [REDACTED], [REDACTED] was acquired by, and became a wholly-owned subsidiary of [REDACTED] (EIN [REDACTED]), a New York corporation. To facilitate this acquisition, [REDACTED] formed [REDACTED] ([REDACTED]) as a wholly-owned subsidiary. [REDACTED] then merged with and into [REDACTED], with [REDACTED] surviving. Thereafter, on [REDACTED], [REDACTED] merged with and into [REDACTED] (its parent) in an upstream merger, with [REDACTED] surviving.

Discussion

Under I.R.C. § 6501(c)(4), the Service and the taxpayer may consent in writing to extend the time for making an assessment if the consent is executed before the normal period of assessment or, in the case of successive agreements, before a previously-extended period expires. The regulations under section 6501(c)(4) do not specify who may sign consents executed under that section with respect to consolidated returns. Instead, the rules pertaining to statute extensions for consolidated returns are contained in Treas. Reg. § 1.1502-77(a) and Temp. Treas. Reg. § 1.1502-77T.

The common parent of a consolidated group is the sole agent for each subsidiary in the group for all matters regarding the tax liability for the group's consolidated return year. Treas. Reg. § 1.1502-77(a). This agency continues for as long as the common parent remains in existence under state law, even if consolidated returns are not filed in subsequent years or corporations join or leave the group. Treas. Reg. § 1.1502-77(a); Craigie, Inc. v. Commissioner, 84 T.C. 466, 474 (1985). Thus, the common parent is generally the proper party to sign consents to extend the period of limitations on assessment for all members of the group. Treas. Reg. § 1.1502-77(a).

This general rule does not apply when the common parent is no longer in existence. If the common parent no longer exists, a waiver of the statute of limitations may be signed by an "alternative agent," as defined in Temp. Treas. Reg. § 1.1502-77(a)(3). Under Temp. Treas. Reg. § 1.1502-77(a)(4)(ii), a waiver may be signed by "[a] successor to the former common parent of the group in a transaction to which section 381(a) applies."

In this case, [REDACTED] continued to be the agent for its consolidated group for the years [REDACTED] through [REDACTED] until its [REDACTED] merger with its parent, [REDACTED]. However, when [REDACTED] merged into [REDACTED] on that date, it immediately ceased to exist under Delaware law. See 8 Del. Code § 259(a) (1996). Because the merger under Delaware law qualifies as a reorganization under I.R.C. § 368(a)(1)(A), it is a transaction to which I.R.C. § 381(a) applies. Thus, as the surviving corporation, [REDACTED] became an "alternate agent" for [REDACTED]'s consolidated return years [REDACTED] through [REDACTED] under Treas. Reg. § 1.1502-77T(a)(4)(ii).

Based on the foregoing, we recommend that [REDACTED] execute the Form 872 with the following language at the top of page one:

[REDACTED] (EIN [REDACTED]), as
alternative agent and successor in interest of [REDACTED]
[REDACTED] (EIN [REDACTED]) *.

and, at the bottom of the form, insert:

* regarding the consolidated tax liability of the
[REDACTED] group's consolidated
return years [REDACTED], and [REDACTED].

We also suggest putting [REDACTED]'s EIN (rather than
[REDACTED]'s) in the box in the upper right-hand corner of the Form
872.

We are simultaneously submitting this memorandum to the National Office for post-review and any guidance they may deem appropriate. Consequently, you should not take any action based on the advice contained herein during the 10-day review period. We will inform you of any modification or suggestions, and, if necessary, we will send you a supplemental memorandum incorporating any such recommendation.

Since there is no further action required by this office, we will close our file in this matter ten days from the issuance of this memorandum or upon our receipt of written advice from the National Office, whichever occurs later. Please call Carmino J. Santaniello at (860) 290-4075 if you have any questions or require further assistance.

BRADFORD A. JOHNSON
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LMSB, Area 1

By: _____
CARMINO J. SANTANIELLO
Attorney